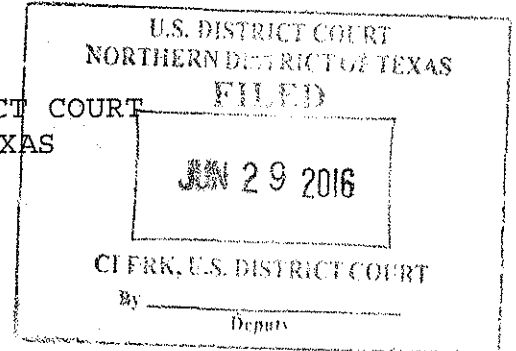


IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION



DOUG KELCEY, ET AL.,  
Plaintiffs,

VS.

PENN-AMERICA INSURANCE COMPANY,  
ET AL.,

Defendants.

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NO. 4:16-CV-337-A

MEMORANDUM OPINION AND ORDER

Came on for consideration the motion of plaintiffs, Doug and Sue Kelcey, to abstain and remand. The court, having considered the motion, the response of defendant Penn-America Insurance Company ("PAIC"), the record, and applicable authorities, finds that the motion should be denied.

I.

Background

Plaintiffs filed their original petition on April 4, 2016, in the 153rd Judicial District Court of Tarrant County, Texas. They allege that they own an insurance policy, number PAC7080864, issued by PAIC; that the policy insured fifteen properties; that the properties sustained wind and hail damage; that plaintiffs submitted a claim to PAIC; that PAIC hired or assigned Crawford & Company ("Crawford") to adjust the claim; that Crawford assigned adjustment and estimation of the claim to Roy Le Sims ("Sims"); and that Crawford and Sims underestimated damages on all fifteen

properties. Plaintiffs assert claims against PAIC for breach of contract, noncompliance with the Texas Insurance Code unfair settlement practices provisions, Tex. Ins. Code § 541.060(a), ("unfair settlement practices"), noncompliance with the prompt payment of claims provisions of the Texas Insurance Code, Tex. Ins. Code § 542.055, .056, and .058, ("prompt payment of claims"), breach of duty of good faith and fair dealing, violation of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code §§ 17.41-.63, and fraud. They assert claims against Crawford for unfair settlement practices, for noncompliance with prompt payment of claims, for DTPA violations, and for fraud. They purport to assert claims against Sims for unfair settlement practices, DTPA violations, and fraud.

On May 10, 2016, PAIC filed its notice of removal, bringing the action before this court. PAIC maintains that jurisdiction is proper based on diversity, in that Sims has been improperly joined.

## II.

### Ground of the Motion

Plaintiffs maintain that PAIC cannot establish that Sims was improperly joined. They dispute the contention that there is no basis for predicting that they might be able to establish

liability against Sims, arguing that they have made sufficient factual allegations against him.

III.

Applicable Legal Principles

A. Removal

Under 28 U.S.C. § 1441(a), a defendant may remove to federal court any state court action of which the federal district court would have original jurisdiction.<sup>1</sup> "The removing party bears the burden of showing that federal subject matter jurisdiction exists and that removal was proper." Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002) (citations omitted). "Moreover, because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns . . . which mandate strict construction of the removal statute." Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365-66 (5th Cir. 1995). Any doubts about whether removal jurisdiction is proper must therefore be resolved against the exercise of federal jurisdiction. Acuna v. Brown & Root Inc., 200 F.3d 335, 339 (5th Cir. 2000).

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<sup>1</sup> The removal statute provides, in pertinent part, that: [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a) (emphasis added).

B. Fraudulent or Improper Joinder

To determine whether a party was fraudulently or improperly joined to prevent removal, "the court must analyze whether (1) there is actual fraud in pleading jurisdictional facts or (2) the plaintiff is unable to establish a cause of action against the nondiverse defendant." Campbell v. Stone Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007). Because defendants have not alleged actual fraud in the pleadings, the applicable test for improper joinder is:

whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004).

To answer this question, the court may either: (1) conduct a Rule 12(b)(6)-type analysis or (2) in rare cases, make a summary inquiry "to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant." Id. at 573-74. A Rule 12(b)(6)-type analysis of plaintiffs' claims appears to be the proper method here to determine whether there exists a reasonable basis for a conclusion that plaintiffs might be able to recover against Sims.

C. The Pleading Standard to be Used in the Rule 12(b)(6)-Type Analysis

Although there has been some uncertainty as to the pleading standard to be applied, the Fifth Circuit has most recently held that federal courts should use the federal court pleading standard when conducting the Rule 12(b)(6)-type analysis of an improper joinder claim in a motion to remand to determine if the plaintiff has stated a claim against a nondiverse defendant. Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd., 818 F.3d 193, 208 (5th Cir. 2016).<sup>2</sup> Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or

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<sup>2</sup>The court notes that Texas now has a failure-to-state-a-claim rule that is substantially the same as the federal rule and that Texas courts have interpreted their Rule 91a as requiring a federal Rule 12(b)(6)-type analysis and have relied on federal case law in applying Rule 91a. See, e.g., Wooley v. Schaffer, 447 S.W.3d 71, 76 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2014, pet. denied); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 754-55 (Tex. App.-Beaumont 2014, pet. denied). Thus, the outcome would be the same if the court were to apply the Texas pleading standard.

recite the elements of a cause of action. Twombly, 550 U.S. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Moreover, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Iqbal, 556 U.S. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Id. In other words, where the facts pleaded do no more than permit the court to infer the possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. Id. at 679. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

In considering a motion under Rule 12(b)(6), the court may consider documents attached to the motion if they are referred to in the plaintiff's complaint and are central to the plaintiff's

claims. Scanlan v. Tex. A&M Univ., 343 F.3d 533, 536 (5<sup>th</sup> Cir. 2003).

#### IV.

##### Analysis

Plaintiffs apparently have a fundamental misunderstanding of what it means to plead facts. They seem to believe that because they have parroted the language of the Texas Insurance Code and DTPA they have pleaded claims that would suffice under Rule 8. They have not. Instead, they have alleged mere labels and conclusions, which the court is not bound to accept as true. Ashcroft, 556 U.S. at 679. For example, plaintiffs say that Sims made misrepresentations, but they do not allege what he said to whom or when. Nor do they allege what actions they took in reliance on any specific representations or how they were harmed.

The petition makes clear that plaintiffs' claims arise out of an alleged breach by PAIC of its duty and the denial of plaintiffs' claim. They do not allege any damages caused by Sims individually. Nor have they alleged any actions outside the scope of Sims' employment. In sum, plaintiffs have failed to state a claim against Sims and there is no reasonable basis for the court to predict that plaintiffs might be able to recover from him.

v.

Order

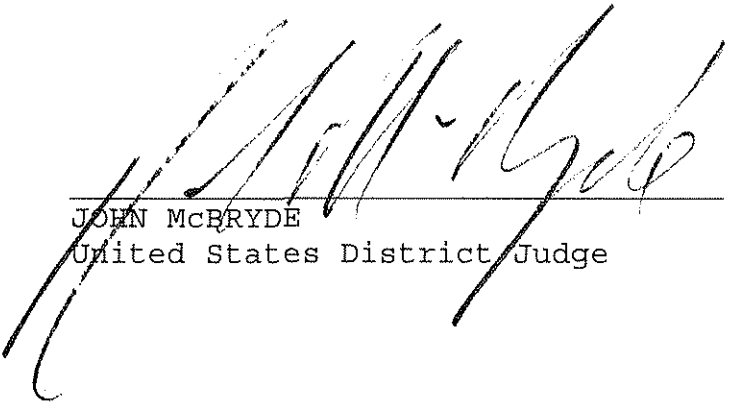
The court ORDERS that plaintiffs' motion to abstain and remand be, and is hereby, denied.

The court further ORDERS that all claims and causes of action asserted by plaintiffs against Sims be, and are hereby, dismissed without prejudice.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to such dismissal.

The court further ORDERS that from this point forward PAIC and Crawford are the only defendants in this action and that the style of this action shall be "Doug and Sue Kelcey, plaintiffs, v. Penn-America Insurance Company, and Crawford & Company, defendants."

SIGNED June 29, 2016.



JOHN MCBRYDE  
United States District Judge